No. 14,911

United States Court of Appeals

For the Ninth Circuit

BARBARA ARRAMONE, a minor, by and through her guardians ad litem, Dominick N. Arramone and Mary I. Arramone,

Appellant,

vs.

JOHN A. PROWSE, as administrator of the Estate of Alvin Prowse, also known as Alvin I. Prowse, Deceased,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

ANSWERING BRIEF OF APPELLEE.

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JURISDICTION.

Statement under this caption in appellant's opening ef is adopted by appellee.

QUESTIONS PRESENTED.

Appellee has no reason to present any further ques- ns in addition to those presented by appellant.

STATEMENT OF CASE.

Appellee adopts the statement under this caption as contained in appellant's opening brief.

STATEMENT OF FACTS RELATIVE TO APPELLANT'S INJURIES AND DAMAGE.

Appellant was involved in an automobile accident at about 2:00 p.m. on August 27, 1953. The injuries sustained by appellant were primarily facial lacerations and loss of four teeth. Immediately following the accident she was taken to the San Joaquin Hospital. There is no notation of any unconsciousness in the records of the San Joaquin Hospital (P Ex 11) and appellant was definitely conscious at 9:00 a.m. on August 28, 1953 (CT p. 26 and 27), and on that date was quite alert and had a visitor, which circumstance did not disturb her; and on August 29 was quite alert, very cooperative with no complaints other than the penicillin shots (P Ex 11) (CT p. 141 and 143); and on August 30 was eating well and was cheerful and cooperative (P Ex 11) (CT p. 35); and by the time of discharge from the San Joaquin Hospital on September 2, 1953—six days after the accident—was quite comfortable and offered *no* complaints and was reading most of the time and had visitors (P Ex 11) (CT p. 35). During the time that appellant was in the San Joaquin Hospital there were no complaints or symptoms to indicate the necessity for any x-rays and none were taken (CT p. 34 and 36). A neurological examination performed at the

n Joaquin Hospital was negative (CT p. 32), and re were no complaints by plaintiff at the San aquin Hospital to indicate brain damage and there s no concern by her physician in this regard (CT 37), and the records of the San Joaquin Hospital note the absence of headaches during appellant's y at that institution (CT p. 37).

On September 2, 1953 appellant was removed to esno, California where she spent four days in the Agnes Hospital (CT p. 46 and 47). There is no ord of any treatment in the St. Agnes Hospital, l no record that there was the necessity for any ays or that any were taken, nor is there any record any evidence of treatment for any brain damage. pellant was able to pose for a photograph while St. Agnes Hospital (CT p. 45) (P Ex 22). On ving St. Agnes Hospital, appellant lived with her le in Fresno (CT p. 201) until September 30, 1953, which time she returned to Chicago by train (CT 47) and she returned to high school in October, 53 to finish her senior year (CT p. 51). She earned diploma and was graduated from high school on nuary 28, 1954 (CT p. 202 and 204). Some time er the appellant obtained a position as a clerk- oist for the telephone company in Chicago and rked five and one-half months; at the end of which ne, and on October 19, 1954, she underwent three urs of plastic surgery, at which time she was hos- alized for four days (CT p. 77 and 80). She has t been hospitalized since, but apparently did not urn to work because of the impending trial for

which she arrived in Sacramento in the month of March, 1955.

Shortly after arriving in Chicago in October, 1953, and on October 12, 1953, appellant reported to her regular dentist in Chicago who repaired four missing teeth with two permanent bridges consisting of two teeth each (CT p. 88, 94 and 95). During this dental treatment, five cavities not caused by the accident were also repaired (CT p. 106 and 107).

The record discloses the following evidence as to each of the injuries that the appellant *claims*:

A. Facial Scars: More than one year *after* the taking of the photographs of the appellant that were introduced into evidence (P Ex 23, 24, 25, 39, 40 and 41), and five and one-half months before the jury was able to view the appellant throughout the course of the four day trial, plastic surgery was performed on the appellant by a highly qualified specialist in Chicago, Illinois (CT p. 77). The scar in the central portion of the appellant's forehead and one just below this one were excised *completely* and closed *without* tension (CT p. 78). The scar arising from the left angle of the mouth, which severed the 7th nerve, was excised and before it was closed a Z-plasty was injected, thus eliminating the distortion from the left angle of the mouth (CT p. 78). The scar on the right half of the chin was excised and the flap was thinned, thereby minimizing the thickened appearance, after which the flap was reinserted (CT p. 79). The final scar, the one on the dorsum of the nose, was repaired without placing any tension on the skin

ges by shortening of the nose which permitted *an fective cosmetic closure of this wound* (CT p. 79 and). The plastic surgery thus performed constituted *75 percent* improvement cosmetically (CT p. 80). few more things remaining to be done (which had t yet been done at the time of trial) will effect a eater degree of cosmetic recovery (CT p. 80 and). The passage of time itself will also cause even ore improvement (CT p. 84).

B. Teeth: As to the replaced teeth, the record dis- ses that in addition to the replaced bridges, a few ner teeth were "traumatized" but were all vital (CT 97), and there was no further evidence of any umatization in the teeth as of April, 1954 (CT p. 9), at which time all of these teeth were normal d vital. Any traumatized teeth are now beyond the ge of having anything further occurring of a detri- ental nature (CT p. 98). Since the installation of e bridges the appellant's bite is normal by all dental ndards (CT p. 110).

C. Chip Fracture of Left Ulnar Process: A frac- re to the left wrist of the appellant, if it existed at , was no more than a small chip fracture of the *yloid process* of the ulnar bone. (The appellant is ght handed.) (CT p. 168) (P Ex 43). There were symptoms subjective or objective of any injury the left wrist while the appellant was in the San aquin Hospital (CT p. 34). There was no com- aint by appellant as to her wrist until at some un- ecified date, after appellant had returned to Chi- go, when appellant was picking up a kettle to make

some tea she dropped the kettle and stated "mother, my wrist!" (CT p. 49). The first x-rays of the wrist were in November, 1953. A cast was never applied. One x-ray picture of the wrist failed to disclose *any* bone pathology (CT p. 169 and 170). No x-ray pictures were ever taken subsequent to November, 1953, and the chip fracture of the styloid process perhaps became entirely dissolved (CT p. 170).

D. Laceration of Right Knee: A laceration of the right knee (at times referred to in the record as left knee) was a *superficial* laceration which was sutured at the San Joaquin Hospital (CT p. 28). This laceration was well in the process of healing when appellant left the San Joaquin Hospital (CT p. 36). No complaint was ever made about the knee by appellant until some unidentified time upon her return to Chicago when she was kneeling in church (CT p. 50). She kneels on the knee, but makes the subjective complaint of pain (CT p. 50).

E. Concussion: There is no evidence of any period of unconsciousness in the hospital records of the San Joaquin Hospital. On August 28, 1953 at 9:00 a.m. appellant was conscious, at which time a neurological examination was performed without difficulty (CT p. 39 and 40). This neurological examination in the San Joaquin Hospital was negative (CT p. 32). Appellant was alert and eating well; was entertaining visitors; was cheerful and was reading during her stay in the San Joaquin Hospital for the six days immediately following the accident (P Ex 11). No x-ray pictures were taken of the skull (or any other part of her

natomy) and there were no complaints or symptoms o indicate the necessity of x-rays (CT p. 34 and 36). There were no complaints to indicate any particular rain damage, and the hospital records denote the *bsence* of headaches at any time, including the initial eriod after the accident (CT p. 37 and 40). A con-ussion is diagnosed from a history of unconscious-ess, and headaches are a mere subjective complaint CT p. 183). An extensive neurological examination n March 31, 1955 (five days before trial began) by highly qualified neurologist was entirely negative except as to the injury to the nerve on the left side f the face) (CT p. 178, 179 and 180).

STATEMENT OF POINTS TO BE URGED.

In opposition to points urged by the appellant, ap-ellee contends that the damages awarded to the ppellant by the jury *were not* grossly and patently nadequate, and certainly do not indicate passion, rejudice or corruption on the part of the jury; and ppellee further contends that the trial court's order enying appellant's motion for a new trial was an buse of discretion, and did not constitute error of aw.

ARGUMENT.

I. THE DAMAGES AWARDED APPELLANT WERE NOT GROSSLY AND PATENTLY INADEQUATE, AND CERTAINLY DO NOT INDICATE PASSION, PREJUDICE OR CORRUPTION ON THE PART OF THE JURY.

Appellant argues that the $6000 awarded to appellant is made to appear grossly inadequate by the fact that the same jury awarded to appellant's parents $4000 for past and prospective hospitalization, medical and dental care. It is difficult to follow such a line of reasoning. The jury in awarding $4000 as special damages apparently gave full credence to every claim of past and estimated future expense even though some of these items were, in appellee's opinion, either exorbitant or highly conjectural. The total amount of medical special damages that had been incurred by appellant's parents at the time of the trial was $2619.21. The bill of the plastic surgeon was extremely high, but was not challenged by appellee since his work was so phenomenal.

The jury apparently added to this figure $1000 for an additional fee of $500 by the plastic surgeon and an additional $500 hospital bill *even though* this additional work was of a comparatively minor nature and the *actual* hospital bill for the *original* plastic surgery was only $167.55. The jury also must have taken into consideration the evidence that *if* the permanent dentures would require replacement several years in the future, the cost would be around $350.

Does such consideration by the jury of the claimed expenses by the appellant's parents permit an argu-

ent that because they were liberal in this instance ey must have been swayed by prejudice or passion *ainst* the appellant in making its award to appel- nt?

Rather than this, does not such behavior by the y support a conclusion that they were in no way ayed by passion or prejudice, but rendered to ap- llant a verdict that they felt was entirely fair and asonable for her general damages?

The award of $6000 was, of course, entirely for *neral* damages which cannot be measured by any rdstick.

Appellant's brief and the nature of the conduction the trial on behalf of appellant clearly indicates at in appellant's mind the greatest portion of her mage, by far results from her facial scars. The ly thing in the record that portrays the nature and tent of these facial scars are the photographs taken the appellant very shortly after the accident when idence for the law suit was apparently the foremost ncern in appellant's mind. However, the important ng is this: The appellant made no such appearance the courtroom as portrayed by the photographs troduced into evidence. She had undergone plastic rgery at the hands of one of the nation's leaders that field who had accomplished at least a 75 per- nt improvement up to the time of trial, with addi- nal surgical corrections contemplated for the fu- re. At the time of trial only five months had elapsed nce the first stage of the plastic surgery, and even ne itself was to act as a further improving factor.

The jury and the court reviewed the photographs which had been taken shortly after the accident; but more important, the court and the jury were able to see through a period of four days the appellant herself and were able to see and fully realize the miraculous improvement in appellant's appearance, and the tremendous contrast between the photographs and the appellant's appearance at the time of trial. The observations of the court and the jury as to the near obliteration of the scars as they appeared in the photographs is something that the record cannot disclose.

Appellee does not believe that this court of appeal could conscientiously supplant any mental picture that *it* might possibly create from the black and white transcript and the pre-surgery photographs, in the place and stead of the actual observations of the appellant's true appearance as it was seen by the twelve jurors and the trial judge.

The alleged chip fracture of the styloid process of appellant's left ulnar bone and the superficial laceration of the right knee are insignificant injuries. The *subjective* complaints of the appellant and her mother concerning these injuries only tend to accentuate the appellant's tendencies to exaggerate, and her mother's tendencies to exhibit unwarranted and exaggerated concern over her daughter's injuries.

The missing teeth have been permanently and satisfactorily replaced without disturbing the appellant's facial contour or her bite.

The laceration on appellant's knee was described by Dr. Evans as superficial and was sutured and

ealed and certainly was insignificant and created no ıbjective complaint until apparently several months ıter when, according to appellant's mother, the appel-ınt complained of it while kneeling in church.

The injuries above outlined, namely, the facial ears, the lost teeth, the alleged chip fracture, and ıe laceration of the knee were the only *objective* in-uries. The complaints of alleged brain damage and sychotic reaction were all purely *subjective* com-laints; therefore fall into a different category and ill be discussed later.

It is well to repeat that the $6000 awarded to the ppellant was entirely an award of general damages; nd, as stated above, there is no yardstick by which measure general damages.

As stated in the case of *Crowe v. Sacks,* 44 C. (2d) 90, 597, "The issues as to loss of earnings or earning ower and as to pain and suffering were disputed, nd the amount to be awarded as compensation there-or was within the province of the jury to determine. *hese amounts are unliquidated.* It cannot be pre-umed on appeal that any element of damage is gnored by the jury merely because the verdict is not or a large sum of money." (Emphasis added.)

In reference to the statement of facts as to appel-ınt's injuries and damage as related above, appellee efers to the case of *Signorelli v. Miller,* 55 C.A. (2d) 38 in which the following language will be found t page 542:

> "In scrutinizing and construing the evidence, we are bound to view its aspects most favorably to sustaining a verdict."

The appeal in the *Signorelli* case resulted from a verdict of $275 in favor of the plaintiff, which plaintiff contended was inadequate, but which judgment was affirmed.

Appellant contends that the damages awarded her by the jury was grossly and patently inadequate. Appellee believes that the only possible basis for an appeal from the jury's award would be on the ground that the award is such as to suggest passion, prejudice or corruption on the part of the jury. (*Sassano v. Roullard,* 27 C.A. (2d) 372; *Morris v. Standard Oil Company,* 188 C. 468; *Bisinger v. Sacramento Lodge No. 6,* 187 C. 578, and many others.)

The case of *Sassano v. Roullard,* (supra) was a case in which a seven year old plaintiff received a wound on the forehead and nose which left a scar that would remain with plaintiff throughout life. Plaintiff appealed from a judgment based upon a jury's verdict in the amount of $250, and the judgment was affirmed. In part, the opinion of the court stated:

> "The principal question for our consideration is that of the adequacy of the damages to compensate for the injuries suffered. In considering this question we must bear in mind the firmly established rules that the jury is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses; that the question of the award of damages and their amount is primarily one for the jury; that on a motion for new trial the trial judge sits as a thirteenth juror; that it becomes his duty to again weigh the evidence and its sufficiency and measure the credibility of

the witnesses; that in so doing it is also his duty to consider the adequacy or inadequacy of the amount of damages awarded; that if he finds the damages either excessive or inadeqate it is his duty to grant a new trial either generally or upon the special issue of the amount of damages or himself reduce excessive damages.

Doing justice between litigants is the prime object of the law. It is in the trial court that this object should be sought and can be obtained by a trial judge who will fearlessly perform the duties of his office and who will exercise a reasonable and lawful control over verdicts. This is a responsibility that cannot be shifted to an appellate court. It rests on the shoulders of the trial judge and no other for the power of appellate courts to control the amount of damages awarded comes into play only when the facts before it are such as to suggest passion, prejudice or corruption on the part of the jury."

In another part in the opinion in the *Sassano* case, e court stated:

"There is no fixed standard by which we may determine the exact amount of money that will compensate one for an injury. (Clare v. Sacramento etc. Co., 122 Cal. 504 (55 Pac. 326).) In the absence of such a standard or precise rule the assessment of the amount of general damages of necessity and to a large extent must be left to the good sense and sound discretion of the jury. (Grant v. Los Angeles Traction Co., 45 Cal. App. 731 (188 Pac. 294).) As we have already seen, it is only when the amount of the award indicates passion, prejudice or corruption on the part of a

jury that an appellate court can interfere with the amount of an award."

The case of *Johnson v. McRee,* 66 C.A. 2d 524, involves a seven year old minor plaintiff who was struck by an automobile, was semi-conscious and in shock following the accident, was bleeding from lacerations of the right temple and right eyebrow, had her legs badly skinned, and many abrasions of her shoulder, knee, cheek and other parts of her body. She remained in the Glendale Sanitarium for one week, having a special nurse during the first night. After returning home she did not move her arms or legs for a week or two, suffered from loss of sleep and pain, occasionally awakening in the night screaming. She remained in her bed at home for a period of three weeks, had bandages on her wounds for more than one month, suffered a concussion of the brain, developed a skin infection, impetigo, which lasted the better part of a month. The accident occurred in November and she returned to school in January. The wound on the right temple left a permanent scar, and the laceration of the right eyebrow also left a scar with a black mark in it, the removal of which would require plastic surgery, and which was also true of black marks on the right cheek. She had occasional headaches for some six or seven months after the accident. The nature and extent of her injuries were proved by physicians who treated her and by members of her family. The defendants offered no evidence.

The jury in this case awarded plaintiff a judgment of $600 from which the plaintiff appealed on the

round of inadequacy of damages, and the judgment as affirmed.

In the *Johnson* case, the court in its opinion stated:

> "Plaintiff's injuries are such as would have justified a verdict materially larger than the one rendered, but this fact would not constitute a sufficient ground for reversal. The appraisal of injuries for the purpose of fixing compensatory general damages is necessarily left to the discretion of the jury. It is a matter of common knowledge that individual opinions as to the amount which will compensate for injuries in a given case may rest at any point in a broad scale and that the consensus of opinion that will be reflected in a verdict is highly unpredictable. But the fact that the amount may be too high or too low, as verdicts go, does not indicate that the result has been reached through passion, prejudice or corruption. It would not be reasonable to suppose that the jury would have been prejudiced against this unfortunate little girl who had been injured without fault upon her part. Nor can it be argued that the amount was reached by compromise upon the issue of liability, since that was admitted. The trial judge exercises a broad discretion upon motion for new trial to set aside a verdict which he believes to be against the weight of the evidence. A reviewing court has no such discretion."

The very recent case of *Sills v. Soto,* 124 C.A. (2d) 39, at page 545, states:

> "The gravity of alleged injuries presents a question of fact which is within the province of the jury to determine. In evaluating the nature and

effect of appellant's injuries, the jury could consider that they had not necessitated hospitalization nor the keeping of appellant under opiates. In fact, he was never bedridden. The appellant was able to attend the trial and the jury could from his physical appearance, facial expressions, and general demeanor draw its own conclusions as to how much pain he was then experiencing. Another factor which the jury could take into account was that only three doctors testified, although appellant was examined or treated by four or five others after the accident. The jury could also consider that the medical opinions expressed were based largely on complaints made by appellant and not on objective symptoms. The jury may have concluded that appellant exaggerated his ailments. (Harris v. Los Angeles Transit Lines, 111 Cal. App. 2d 593, 599 (245 P. 2d 35).) Since it cannot be said that from all the facts and the inferences which could be drawn therefrom there could not be a reasonable difference of opinion as to whether or not appellant's general damages exceeded $1,841.80, it cannot be held as a matter of law that the $2,500 awarded him by the jury was inadequate. For the same reason, it cannot be said that the trial judge abused his discretion in refusing to grant a new trial on the ground that the damages were inadequate."

Now we will consider the other allegations of injuries by appellant in addition to those *objective* injuries discussed above. These other alleged injuries are the concussion and the emotional or psychiatric reactions which were diagnosed from various *subjective* symptoms.

The only bases for a finding that these additional *bjective* injuries occurred or exist are the com-aints of the appellant which came into evidence rough history that she gave to doctors, and the testi-ony of appellant's mother.

As a matter of fact, as far as the symptoms of a ncussion are concerned, the only unbiased and edically-founded evidence in this regard is contained the records of the San Joaquin Hospital which re introduced into evidence by appellant herself. As rtions of these hospital records were above related, ey form the basis for a finding that any concussion, ner than a very mild one, actually *did not* occur. to a jury's right to discount or refuse to accept stimony as to subjective complaints, and as to the ty of an appellate court to sustain a jury's refusal accept purely subjective complaints, the very recent se of *Nelson v. Black,* 43 C. (2d) 612, is quite perti-nt.

In that case the defendants admitted liability for e accident and contested only the issue of damage. ne jury, however, returned a verdict in favor of e defendants and the judgment based on this verdict as affirmed on appeal. The opinion of the California preme Court stated:

> "He (plaintiff) claims that as a result of the impact he was partially or totally disabled for some time and incurred medical and hospital expenses amounting to more than $600. But there was no objective manifestation of injury, and the testimony of the medical experts presented by him was based entirely upon his statements to

> them in regard to headache and other pain which he assertedly suffered. . . . From the conflicts in his own testimony and with other evidence in regard to the nature of the medical treatment he received, the extent and duration of his asserted disability, and his physical condition prior to the accident, the jury reasonably could have concluded that he testified falsely concerning those matters. Having so determined, it could have disregarded his entire testimony (Code Civ. Proc., 2061, subd. 3), concluded that he suffered no injury, and found all of his subjective complaints to be false."

As above stated, all of the evidence of these subjective complaints came either from the appellant's history to physicians, or from appellant's mother's testimony.

We have discussed above the appellant's tendencies in her history to exaggerate, for example, the symptoms resulting from the rather trivial injury to the left arm and the superficial laceration of the knee. Also appellant's testimony as to three days of unconsciousness immediately following the accident (CT p. 200) is a gross exaggeration, if not an intentional falsehood, when such testimony is compared to the hospital records of the San Joaquin Hospital (P Ex 11).

As to the appellant's mother's testimony, it is quite apparent that the mother was prone to greatly exaggerate, or falsify in several instances. On one of these instances the mother testified that appellant saw Dr. Smalley on an average of twice a week for the

st six months and on an average of once a week ereafter (CT p. 48 and 49), which would make a tal of 78 times during the first 12 months of treatent by Dr. Smalley; whereas Dr. Smalley testified at from October 9, 1953 to October 14, 1954, he saw pellant a total of 18 times (CT p. 167 and 168). On other occasion appellant's mother testified that apllant's memory had been affected by the accident d that she was very forgetful (CT p. 59 and 60); ereas, the appellant herself during cross-examinan (CT p. 203 to 205) displayed a rather remarkable mory for dates and small details of incidents in e past. As another example, appellant's mother tified as to an impairment in appellant's gait (CT 62); whereas, an examination of her gait by a urologist, five days before the trial, disclosed a pertly normal gait (CT p. 180).

It was within the power of the jury after hearing ese exaggerations or falsehoods to disregard the tire testimony of the appellant and her mother in cordance with the rule laid down in the case of *Nelon v. Black* (supra). It cannot be stated definitely at the jury actually did disregard all of the appelnt's complaints of a subjective nature because the ward of $6000 for general damages was a substantial ward, but if, in fact, the size of the jury's verdict as altered because of the jury's refusal to believe all the subjective complaints, the jury was justified making such alterations.

In her argument on this point, the appellant cites ly one "authority". This is the case of *Macias et*

al. v. Western Union Telegraph Company, et al., 83 Federal Supplement 492. It will be noted first of all that this opinion was the opinion of a District Court Judge in support of the trial court's granting of a new trial to the minor plaintiff. As stated in *Johnson v. McRee* (supra):

> "The trial judge exercises a broad discretion upon motion for new trial to set aside a verdict which he believes to be against the weight of the evidence. A reviewing court has no such discretion."

Further language from the case of *Johnson v. McRee* is as follows:

> "The decision upon motion for a new trial that the verdict as to the amount was not against the weight of evidence must necessarily have great weight upon appeal, where the contention is, in effect that the evidence was disregarded by the jury. The limitations upon the power of a reviewing court to vacate a judgment for inadequacy of damages are too well understood to require elaboration. They are fully stated in Sassano v. Roullard (supra) and cases therein cited."

Appellee certainly does not dispute the power and duty of a district court judge to grant a new trial on the ground that the damages awarded were inadequate if such a district court judge believes that the ends of justice demand such a new trial. The opinion in the case of *Macias v. Western Union* simply states the trial court's reason for granting a new trial.

THE TRIAL COURT'S ORDER DENYING APPELLANT'S MOTION FOR A NEW TRIAL DID NOT AMOUNT TO SUCH AN ABUSE OF DISCRETION AS TO CONSTITUTE ERROR OF LAW.

California law does not permit an appeal from an der denying a new trial (*Signorelli v. Miller,* upra]). However, whether or not this appeals court ould follow the California rule in this regard or ether it is a matter of procedure will not be argued. this point, however, appellee wishes to initiate his gument by quoting from the opinion of Justice andeis in the case of *Fairmont Glass Works v. Cub rt Coal Company,* 287 U.S. 474, 53 S.Ct. 252, 77 Ed. 439:

> "The rule that this court will not review the action of a Federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action *by a Circuit Court of Appeals.* Its early formulation by this court was influenced by the mandate of the judiciary act of 1789 which provides . . ." (Emphasis added.)

Appellee submits that the language above quoted n be construed in only one way and as applied to s case, where the trial court has denied a motion new trial made on the ground that the damages arded by the jury were inadequate, is a clearly ted directive to this appeals court *not* to review the ion of the trial court in this regard.

Appellant does not escape the effect of the decision in the *Fairmont Glass Works* case simply by dividing her argument into two sections. If this appeals court were to declare the damages awarded to the appellant to be inadequate as a matter of law *on any ground* this appeals court would, in effect be reviewing the action of the trial judge in denying plaintiff's motion for a new trial.

If any other argument can be considered in any way necessary in this case, appellee again briefly refers to the fact that the trial judge, as well as the 12 jurors, had an opportunity to see the plaintiff at close range and often during the four day trial and had a true picture of appellant's appearance and the effect, if any, that her injuries had upon her, and even with his broad powers of discretion on appellant's motion for a new trial, the trial court saw fit to deny said motion. Again we repeat that certainly this appeals court is in no position, from a mere review of the record, to go so far as to say that the trial judge abused his discretion. This is especially so when we consider that not only has this appeals court been deprived of an opportunity to actually observe the appellant at this time, but more so when we consider the limitations on the powers of an appeals court to set aside a verdict for inadequacy of damages.

Appellant does not believe that any of the cases cited by appellant in any way bolster her position. The first case cited *Berry v. Lake Erie and W. R. Co.,* 72 Fed. 488, is simply an opinion of a trial judge in support of the trial judge's *denial* of a new trial be-

ıse of alleged inadequacy of the jury's award. In s case the trial judge stated that the verdict of 100.00 for the loss of the right leg of the 7 year old ıor plaintiff below the knee was certainly consider- y less than he would have awarded in the case, but ll the trial judge did not feel that he could, even his discretion on this matter, grant a new trial.

The case of *Virginia Ry. Co. v. Armentrout,* 116 d. (2d) 400, is simply another example of the re- sal by a court of appeals to set aside a verdict of jury. In this case the court simply decided that ey could not, as a matter of law, state that 50,000.00 was excessive for the loss by plaintiff of h of his hands and arms.

The case of *Aetna Casualty and Surety Company Yeatts,* 4 Cir., 122 F. (2d) 350. The appeal in this e was not based upon inadequacy or excessiveness the jury's award. The court stated, however:

> "Verdict may be set aside and a new trial granted when the verdict is contrary to the clear weight of evidence or whenever, in exercise of a sound discretion, the trial judge thinks this action necessary to prevent a miscarriage of justice.
>
> It is equally well settled, however, that the granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and that his action is not reviewable upon appeal save in the most exceptional circumstances."

At the end of this statement the court cited a long of authorities and then quoted the same portion the opinion of Justice Brandeis in the case of *Fair-*

mont Glass Works v. Cub Fort Coal Co., that appellee has quoted above. This case, therefore, supports the position of the appellee in this appeal and we cannot see that it does in any way aid the appellant.

The case of *Southern Pacific Co. v. Guthrie,* 186 Fed. 2d 926, is simply a case wherein the appeals court again refused to reverse a District Court which had denied a motion for a new trial based on excessive damages.

The case of *Cunningham v. State,* 34 N.Y.S. 2d, 309, apparently involves proceedure not in accord with procedure in the state of California. Appellee is not familiar with the system of courts in the state of New York and is not sure that the "appeal" in this case was not simply a review by the trial court. Otherwise appellee cannot account for an increase in an award by an appeals court.

It is most interesting to note that appellant offers no case wherein any court of appeal has reversed a trial court for refusing to grant a new trial based upon inadequacy of damages.

CONCLUSION.

Examination of the evidence in the light most favorable to sustain the verdict indicates that the damages awarded appellant were adequate; but if the evidence is susceptible to the interpretation that appellant was entitled to a more substantial award, there is no indi-

ion that the jury made its award under the influ-
e of passion, prejudice or corruption.

Examination of the authorities indicates that since
trial court denied appellant's motion for a new
l based upon error of fact, this appeals court has
power to review such action by the trial court.
wever, if the appeals court does review such action
the trial court, its limitations in that regard are
h as to preclude any reversal of the trial court's
ions because of the state of the record.

Dated, Sacramento, California,
April 2, 1956.

Respectfully submitted,
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